

Message

From: Hurlid, Kathy [Hurlid.Kathy@epa.gov]
Sent: 10/8/2019 8:03:02 PM
To: Frazer, Brian [Frazer.Brian@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]
Subject: FW: Cooling Water Intake Rule - ESA
Attachments: EPA-HQ-OW-2008-0667-4094 (316b esa memo to record).pdf; 316(b) FR notice 8-15-14.pdf; fr66-11202 (Coordination MOA).pdf; Final-316b-Biological-Opinion-and-Appendices-May-19-2014.pdf; cooling-water_esa-instructional-memo_12-11-2014.pdf

So, I'm not sure what the action here is. I've not heard back from John or anyone else regarding the comments I sent last night (well, sent last night but did not leave my outbox until this am when I was back on the agency server)

I don't think my concerns change based upon this message from Steve except that I'd like to reiterate the need to reach out to OWM on: **Ex. 5 Deliberative Process (DP)** I have spoken with staff in OWM and a little with Tom McGill in R4 and both have **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

I am out for the Holiday tomorrow. Back in on Tuesday.

- Kathy

From: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Sent: Monday, October 07, 2019 6:21 PM
To: Goodin, John <Goodin.John@epa.gov>
Cc: Nagle, Deborah <Nagle.Deborah@epa.gov>; Wood, Robert <Wood.Robert@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Gutierrez, Sally <Gutierrez.Sally@epa.gov>; Zobrist, Marcus <Zobrist.Marcus@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Nalven, Heidi <Nalven.Heidi@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: FW: Cooling Water Intake Rule - ESA

This message to OWOW responds to a cross-cutting request made by Dave Ross and John and me this morning asking

Ex. 5 Deliberative Process (DP)

Dave's email request was as follows:

> Confidential; Deliberative

"I'm currently evaluating a 404(g) state assumption proposal from Florida and Arizona and how to address ESA issues in state-assumed permitting. The proposal mentions the ESA process for the cooling water intake rule as a potential model. Could someone pull together the ESA-based components of that rulemaking for me, such as targeted discussion in the preamble, RTC, Bi-Op, etc. I'm not sure if this is an OGC or OWM assignment, so please work together to figure out the most efficient way to get a packet together."

In a conversation this morning Dave explained to me and John that while he was interested in learning generally about the process under 316(b), he was particularly interested in

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

John – Alexis quickly pulled together the relevant attached documents from the rulemaking and ESA consultation and her note below highlights the most relevant portions of each document. To my mind, if Dave read the first document (EPA memo to record), he would get a good understanding of the process, but the source materials are attached as well.

Ex. 5 Deliberative Process (DP)

Steve Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
202 (564-5488)

From: Wade, Alexis <Wade.Alexis@epa.gov>

Sent: Monday, October 7, 2019 2:32 PM

To: Kupchan, Simma <Kupchan.Simma@epa.gov>

Cc: Witt, Richard <Witt.Richard@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>

Subject: RE: Cooling Water Intake Rule - ESA

Here are the key 316(b) documents and I've highlighted the pages I think are most important for Dave.

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| 1. 316(b) ESA memo to the record – | Ex. 5 Attorney Client (AC) |
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| Ex. 5 Attorney Client (AC) |
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2. Preamble and rule – The preamble reaffirms the commitments in the 2001 MOA and includes the ESA procedures that are relevant. See pg. 48380 Section K for that discussion, in particular page 48381 column 3 to 48382.
 3. 2001 Coordination MOA with the Services. See pgs. 11215-11216 for the procedures for issuance of state permits.
 4. Joint Biological Opinion – Pages 68-74 describes the procedures in the rule and the Services' conclusions re: effects. The incidental take statement is on page 75-76.
 5. Instructional memo to the water division directors. The memo describes the rule requirements for permitting director's relevant to listed species. We sent this memo to comply with Term and Condition #4 on page 77 of the BO.

Alexis Wade
Attorney-Adviser
Water Law Office
EPA Office of General Counsel
(202) 564-3273

From: Kupchan, Simma <Kupchan.Simma@epa.gov>

Sent: Monday, October 07, 2019 11:58 AM

To: Wade, Alexis <Wade.Alexis@epa.gov>

Cc: Witt, Richard <Witt.Richard@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Subject: FW: Cooling Water Intake Rule - ESA

Importance: High

Alexis and Richard,

See below. Dave would like the ESA-based components of the Cooling Water Intake Structure rulemaking, such as targeted discussion in the preamble, RTC, Bi-Op, etc., to inform his decision on the applicability of ESA to approving state CWA section 404 programs. Is that something you could pull together? Let me know if I can help with this.

We should send to Mindy when compiled.

Simma Kupchan
EPA Office of General Counsel
Water Law Office
WJC North Building # 7426Q
202-564-3105

From: Goodin, John <Goodin.John@epa.gov>
Sent: Monday, October 7, 2019 11:42 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Nalven, Heidi <Nalven.Heidi@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
Subject: Re: Cooling Water Intake Rule - ESA

Thanks, Steve— and Mindy, please send me those materials from OGC and the letters Dave references so that we can bundle into one email response.

Thanks!

John

Sent from my iPhone

On Oct 7, 2019, at 11:29 AM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

can you all coordinate with mindy – and send her whatever we did to support the silva memo at the time as well as the later legal analysis.

Steve Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
202 (564-5488)

From: Ross, David P <ross.davidp@epa.gov>
Sent: Monday, October 7, 2019 8:41 AM
To: Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Fwd: Cooling Water Intake Rule - ESA

John,

Could you also send me a copy of the Pete Silva memo and the ECOS letter that triggered it? And are you aware of any OGC analysis that was done in support of the Silva memo? Thanks.

Dave

Sent from my iPad

Begin forwarded message:

From: "Ross, David P" <ross.davidp@epa.gov>
Date: October 7, 2019 at 8:39:09 AM EDT
To: "Fotouhi, David" <Fotouhi.David@epa.gov>, "Sawyers, Andrew" <Sawyers.Andrew@epa.gov>, "Goodin, John" <Goodin.John@epa.gov>, "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Cc: "Leopold, Matt (OGC)" <Leopold.Matt@epa.gov>, "Forsgren, Lee" <Forsgren.Lee@epa.gov>, "Aguirre, Janita" <Aguirre.Janita@epa.gov>, "Wildeman, Anna" <wildeman.anna@epa.gov>
Subject: Re: Cooling Water Intake Rule - ESA

Adding Steve.

Sent from my iPad

On Oct 7, 2019, at 8:38 AM, Ross, David P <ross.davidp@epa.gov> wrote:

Confidential; Deliberative

I'm currently evaluating a 404(g) state assumption proposal from Florida and Arizona and how to address ESA issues in state-assumed permitting. The proposal mentions the ESA process for the cooling water intake rule as a potential model. Could someone pull together the ESA-based components of that rulemaking for me, such as targeted discussion in the preamble, RTC, Bi-Op, etc. I'm not sure if this is an OGC or OWM assignment, so please work together to figure out the most efficient way to get a packet together.

Thanks!

Dave

Sent from my iPad